Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CIPRIANO CORRAL, CATALINA CORRAL,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
FOR THE FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

GARY A. UDASHEN
Counsel of Record

MILNER, GORANSON, SORRELS
UDASHEN & WELLS
2515 MCKINNEY AVENUE
#1500, L.B. 21
DALLAS, TEXAS 75201
(214) 651-1121
(214) 953-1366 FAX

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

I. Is the opinion of the Court of Appeals of Texas, as upheld by the Court of Criminal Appeals of Texas, in conflict with this Court's opinion in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)?

II. Is the opinion of the Texas Court of Appeals in the case at Bar in conflict with the opinion of the United States Court of Appeals for the Fifth Circuit in *Doyle v. Johnson*, 235 F.3d 956 (5th Cir. 2000)?

PARTIES TO THE PROCEEDINGS

Cipriano Corral and Catalina Corral - Petitioners
represented by:

Gary A. Udashen
2515 McKinney Avenue
Suite 1500, L.B. 21
Dallas, Texas 75201
214-651-1121

The State of Texas - Respondent
represented by:

Bill Hill
Dallas County District Attorney
Frank Crowley Courts Building
133 N. Industrial Blvd.
Dallas, Texas 75201
214-653-3600

and John Cornyn
Texas Attorney General
209 W. 14th Street
Austin, Texas 78711-2548
512-463-2100

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Petitioners, Cipriano Corral and Catalina Corral, hereby petition for a Writ of Certiorari to review the opinion of the Texas Court of Appeals, Fifth District (entered November 2, 1999, rehearing denied January 3, 2000), as upheld by the Texas Court of Criminal Appeals (Petition for Discretionary Review dismissed May 30, 2001), affirming the District Court's denial of Petitioner's application for writ of habeas corpus alleging a violation of their right to be free from double jeopardy under the U. S. Constitution, amends. V and XIV.

OPINION BELOW

The opinion of the Texas Court of Appeals, Fifth District, dated November 2, 1999, affirming the denial of Petitioner's application for writ of habeas corpus is:

Ex parte Cipriano Corral, No. 05-97-00891-CR and

Ex parte Catalina Corral, No. 05-97-00895-CR

This opinion was unpublished. A copy of this opinion may be found in Appendix A of this petition. The order of the Court of Appeals denying rehearing, dated January 3, 2000, may be found in Appendix E of this Petition.

The opinion of the Texas Court of Criminal Appeals dismissing Petitioners' Petition for Discretionary Review, seeking review of the Court of Appeals opinion, dated May 30, 2001 may be found in Appendix B of this Petition.

The previous opinion of the Texas Court of Appeals, Fifth District in this case, dated November 18, 1997, is unpublished and may be found in Appendix C of this Petition. The previous opinion of the Texas Court of Criminal Appeals

on State's Petition for Discretionary Review, dated April 22, 1998 is unpublished and may be found at Appendix D of this Petition.

STATEMENT OF JURISDICTION

The Texas Court of Appeals affirmed the denial of Petitioner's Application for Writ of Habeas Corpus on November 2, 1999. Rehearing was denied on January 3, 2000. Petitioners filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals and this Petition was dismissed May 30, 2001.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. V, Double Jeopardy provision:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

United States Constitution, amend. XIV:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This is an appeal from a denial of Applications for Writs of Habeas Corpus filed by Catalina and Cipriano

Corral. The Petitioners were charged with the offense of aggravated possession with intent to deliver cocaine in state court in Dallas County, Texas. On November 16, 1993, notice was sent to both Petitioners that a tax of $245,740 was being levied against them by the Comptroller of Public Accounts for the State of Texas under the Controlled Substances Tax Act, Texas Tax Code § 159.101. (R. - October 14, 1994, p. 4-14)(R.- March 7, 1997, p. 4-20). The parties stipulated that the tax action was based on the same seizure of 1163.3 grams of cocaine on which the pending indictments are based. (R. - October 14, 1994, p. 5).

Not only was the tax levied against Petitioners, but their bank account was frozen and the money turned over to the State by Texas Commerce Bank. On August 11, 1994, Texas Commerce Bank wrote a check to the Texas Comptroller for $2,434.79 out of Petitioner's bank account. (R. - October 14, 1994, p. 4-14) (R. - March 7, 1997, p. 4-20).

Petitioners filed Applications for Writs of Habeas Corpus alleging that their prosecution was barred by principles of double jeopardy under U. S. Constitution Amendments V and XIV based on an assessment under the Texas Controlled Substances Tax Act. (See Applications for Writs of Habeas Corpus and Memorandum of Law, arguing that criminal prosecution barred under the double jeopardy provisions of U. S. Const., amends. V and XIV). The District Court found the tax assessed to be punitive but denied the Applications on other grounds. (Order Denying Habeas Corpus). Notice of Appeal was filed on May 19, 1997. On November 18, 1997, the Texas Court of Appeals, Fifth District, reversed the judgment of the District Court citing U. S. Constitution, amend. V and *Kurth Ranch*, (see Court of Appeals opinion, "we conclude that prosecution of appellants

for possession with intent to deliver cocaine is barred by the Double Jeopardy Clause because appellants have already been punished for that offense by the imposition and partial collection of a tax on the cocaine.")

Subsequently, the State of Texas filed Petitions for Discretionary Review. On April 22, 1998, the Texas Court of Criminal Appeals granted the State's Petition and remanded for reconsideration in light of *Ex parte Ward*, 964 S.W.2d 617 (Tex. Crim. App. 1998). On November 2, 1999, the Texas Court of Appeals, in an Opinion on Remand, reversed it's previous decision and affirmed the trial court's judgment. (See Court of Appeals opinion, "We therefore conclude that prosecution of appellants for possession with intent to deliver cocaine is not barred by the Double Jeopardy Clause"). Petitioners' rehearing motion was denied on January 3, 2000.

Petitioners filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals on March 2, 2000 arguing in a Ground for Review that, "The Court of Criminal Appeal's opinion in *Ward* is in conflict with the Supreme Court's opinion in *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994)", and citing constitutional double jeopardy protections. The Court of Criminal Appeals granted the Petition for Discretionary Review on September 13, 2000. Following briefing by the parties, the Court of Criminal Appeals decided that the decision to grant the petition was improvident and the petition was dismissed.

REASONS FOR GRANTING THE WRIT

Question for Review I

Is the opinion of the Court of Appeals of Texas, as upheld by the Court of Criminal Appeals of Texas, in conflict

with this Court's opinion in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)?

Reasons for Granting the Writ

In *Department of Revenue of Montana v. Kurth Ranch*, the Court found that a Montana tax on the possession of marijuana was a punishment for purposes of the constitutional prohibition against successive punishment for the same criminal offense. In so holding, the Court held that the Montana tax was,

> "a second punishment within the contemplation of a constitutional protection that has deep roots in our history and jurisprudence and therefore must be imposed during the first prosecution or not at all. The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy for the same offense." *Kurth Ranch*, 511 U.S. at 784.

The Texas Court of Criminal Appeals has found the Texas Controlled Substance Tax, Tex. Tax Code 159.101 to be similar to the Montana Tax Act and thus to constitute punishment for double jeopardy purposes. See *Stennett v. State*, 941 S.W.2d 914 (Tex. Crim. App. 1996); *Ex parte Ward*, 964 S.W.2d 617 (Tex. Crim. App. 1998), *cert. denied* 119 S.Ct. 66.

In it's first opinion on this case, the Texas Court of Appeals found that under *Kurth Ranch* and *Stennett*, the Petitioners had been punished by the actions taken by the State

in connection with the drug tax and therefore double jeopardy principles barred the further criminal prosecution. However, after the issuance of that opinion, the Court of Criminal Appeals issued it's opinion in *Ward*, *supra*, and purported to narrow the instances where jeopardy would attach. In *Ward*, the court held that "absent full payment of the tax or a pay arrangement with the Comptroller's Office for the remaining amount due, there is no punishment for purposes of the Double Jeopardy Clauses' prohibition against multiple punishments." *Id.* at 632. The Court of Appeals, in its opinion on remand in the case at bar, relied on this language in finding no double jeopardy violation.

Petitioners submit that the Court of Criminal Appeals opinion in *Ward* and the Court of Appeals opinion in the case at bar are in direct conflict with *Kurth Ranch*. In *Kurth Ranch*, the Court did not indicate that the State could collect only part of the tax, forego the collection of the remainder, and therefore avoid a double jeopardy problem. Rather, the Court found that the proceeding to collect the tax was the functional equivalent of a successive criminal prosecution that placed the taxpayers in jeopardy a second time for the same offense. The clear meaning of *Kurth Ranch* is that proceedings to collect the tax constitute a jeopardy creating event, and certainly a partial collection would create a jeopardy bar to another criminal prosecution.

The opinion of the Texas courts essentially holds that a partially imposed punishment does not create a jeopardy bar to a second prosecution. Under this reasoning, if a defendant has served only a portion of a jail sentence imposed, there is no jeopardy bar to a second prosecution or punishment for the same offense. Clearly, this is not the interpretation of the Double Jeopardy Clause adopted by this Court in *Kurth Ranch* and therefore the Texas courts are following an interpretation

of the law in direct conflict with the Supreme Court's opinion in *Kurth Ranch*. Because Petitioners' rights to be free from double jeopardy under the U. S. Constitution, amends. V and XIV were violated by this erroneous interpretation, this Petition should be granted.

QUESTION FOR REVIEW II

Is the opinion of the Texas Court of Appeals in the case at bar in conflict with the opinion of the United States Court of Appeals for the Fifth Circuit in *Doyle v. Johnson*, 235 F.3d 956 (5th Cir. 2000)?

REASONS FOR GRANTING THE WRIT

The defendant in *Doyle* was arrested for possession of methamphetamine. He was then notified that he owed a tax in the amount of $8,200.00 on the methamphetamine pursuant to Section 159.101 of the Texas Tax Code. His Double Jeopardy argument was rejected and the case made it's way to the United States Court of Appeals. The Court of Appeals' opinion addressed a double jeopardy argument similar to that present in the case at bar. In *Doyle*, the Court found no double jeopardy violation because the criminal conviction preceded any seizure of funds from Doyle pursuant to the tax assessment. However, the Court stated,

> "With respect to the tax, jeopardy attached on January 13, 1995 when the Comptroller confiscated Doyle's bank account."[1]

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[1] The Court in *Doyle* also stated, "Additionally, we hold that jeopardy attaches, with regard to a tax imposed under Section 159.101 of the Texas Tax Code when the government takes title to

In the case at bar, the evidence showed that after Petitioners received the tax notice, their bank account was frozen and the $2,434.78 in that account was seized and turned over to the Texas State Comptroller by the bank. In his Order Denying Habeas Corpus, the District Court stated,

> "The defendant's bank account was thereafter seized, and the balance was transmitted by the bank to the Comptroller."

Under the reasoning of *Doyle*, that event caused jeopardy to attach. Based on that attachment of jeopardy, any further criminal prosecution of Petitioners is in violation of their right to be free from double jeopardy under the U. S. Const., amends. V and XIV.

The reasoning of *Doyle* is consistent with *Kurth Ranch* and inconsistent with the Texas Court's holding in the case at bar and *Ward*. The Texas Courts holding is that "absent full payment of the tax or a pay arrangement with the Comptroller's Office for the remaining amount due, there is no punishment for purposes of the Double Jeopardy Clauses' prohibition against multiple punishments." *Ward*, 964 S.W.2d at 632. However, in *Doyle*, the Fifth Circuit found a partial payment of $1,867.55, the amount seized from the defendant's bank account, to cause jeopardy to attach. Under the reasoning of *Doyle*, Petitioners' application for writ of habeas corpus would be granted, whereas the Texas Court's have denied it.

Based on the direct conflict between the Texas Courts and the United States Court of Appeals for the Fifth Circuit

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a defendant's assets."

over the application of the Double Jeopardy Clause, this Petition should be granted.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS, Petitioners pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GARY A. UDASHEN
State Bar No. 20369590

MILNER, GORANSON, SORRELS,
UDASHEN, & WELLS
2515 McKinney Avenue
Suite 1500, L.B. 21
Dallas, Texas 75201
(214) 651-1121
(214) 953-1366 Fax

APPENDIX A

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS

[Filed November 2, 1999]

No. 05-97-00891-CR
No. 05-97-00895-CR

EX PARTE CIPRIANO CORRAL,
EX PARTE CATALINA CORRAL

Appeal from the Criminal District Court No. 2
Dallas County, Texas
No. W94-00772-I and No. W94-00768-I

Before Chief Justice Thomas and
Justices Wright and Moseley.

OPINION ON REMAND

Opinion By Chief Justice Thomas

This is an opinion on remand from the Texas Court of Criminal Appeals. Cipriano Corral and Catalina Corral appealed from the trial court's denial of the relief requested in their applications for writ of habeas corpus. They maintained they could not be prosecuted for possession with intent to deliver cocaine after they were taxed on the cocaine and paid

a portion of that tax. Based on the court of criminal appeals' decision in *Stennett v. State,* 941 S.W.2d 914, 917 (Tex. Crim. App. 1996), we agreed and concluded that criminal prosecution was barred. The court of criminal appeals granted the State's petition for discretionary review, vacated our judgments, and remanded these causes for reconsideration in light of its more recent decision in *Ex parte Ward,* 964 S.W.2d 617(Tex. Crim. App.), *cert. denied*, 525 U.S. 823, 142 L. Ed. 2d 52, 119 S. Ct. 66 (1998). After such reconsideration, we modify the trial court's orders denying appellants the relief requested in the applications for writ of habeas corpus, and as modified, we affirm.

BACKGROUND

Appellants are husband and wife. On September 18, 1993, the police executed a search warrant at appellants' apartment. The police seized from them 1163.3 grams of cocaine. Appellants were subsequently indicted for possession with intent to deliver cocaine. On November 16, 1993, the Comptroller of Public Accounts for the State of Texas notified appellants that, pursuant to the Controlled Substances Tax Act, they owed taxes and penalties of $ 245,740 on the cocaine seized.[1] *See* TEX. TAX CODE ANN. §§ *159.001*-.301 (Vernon 1992 & Supp. 1999) (Controlled Substances Tax Act). Later, the Comptroller instructed appellants' bank

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[1] The Act imposes a tax "on the possession, purchase, acquisition, importation, manufacture, or production by a dealer of a taxable substances on which a tax has not previously been paid." TEX. TAX CODE ANN. § 159.101(a) (Vernon 1992). Cocaine is a taxable substances and is taxed at a rate of $ 200 per gram. TEX. TAX CODE ANN. §§ 159.001(7), 159.101(b) (Vernon 1992 & Supp. 1999).

to freeze appellants' account as authorized by section 111.021 of the tax code.[2] *See* TEX. TAX CODE ANN. § 111.021(d) (Vernon 1992). The Comptroller eventually sent the bank a notice of levy, directing the bank to send it all of appellants' assets in the bank's possession, not to exceed $ 245,740. The bank sent the Comptroller a check for $ 2434.79, all the money appellants had on deposit.

Appellants filed applications for writ of habeas corpus. They argued that the criminal prosecutions pending against them violated the Double Jeopardy Clause because they had already been punished for the drug offenses through the assessment and collection of the tax.[3] The trial court denied appellants the relief requested in their applications for writ of habeas corpus.

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[2] The bank account in question was in Catalina Corral's name only; however, the trial court found that the account was community property.

[3] The Fifth Amendment to the United States Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause provides three separate protections for criminal defendants: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. *Ex parte Stover*, 946 S.W.2d 343, 345 (Tex. Crim. App. 1997). The third protection, the implicated by the facts of this case, is limited, in the context of a single proceeding, to ensuring that the total punishment imposed does not exceed that authorized by the legislature. *Id.*

On original submission, based on the court of criminal appeals' decision in *Stennett v. State*, we concluded that prosecution of appellants for possession with intent to deliver cocaine is barred by the Double Jeopardy Clause because appellants have already been punished for that offense by the imposition and partial collection of a tax on the cocaine. *Stennett v. State*, 941 S.W.2d 914, 917 (Tex. Crim. App. 1996). In *Stennett*, the Comptroller billed the defendant for taxes of $ 49,070 on marijuana. *Id. at 915.* The defendant sent the Comptroller a check for $ 100. He then filed an application for writ of habeas corpus, alleging that payment of the tax barred his criminal prosecution for possession of marijuana. *Id.* The Houston Fourteenth Court of Appeals concluded that the defendant could not be prosecuted for possession of marijuana because he had already been punished for that offense by the imposition and partial collection of a tax on the marijuana. *Id.* The court of criminal appeals affirmed, holding that the Texas tax on controlled substances is a punishment for double jeopardy purposes.[4] *Id.* at 917.

In *Ex parte Ward*, however, the court of criminal appeals overruled *Stennett* to a certain extent. Thus, the court has remanded these causes to us for reconsideration in light of *Ward*.

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[4] The court relied on the United States Supreme Court's opinion in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994), in which the Court held that a Montana tax on possession of marijuana, similar to the Texas tax, was a punishment for purposes of the constitutional prohibition against successive punishments for the same criminal offense. *Stennett*, 941 S.W.2d at 915-17.

Ex Parte Ward

In *Ward*, the court of criminal appeals considered an issue not addressed in *Stennett*. Specifically, the court considered the issue of when a person is punished by the controlled substances tax so as to forbid the State from "attempting a second time to punish criminally." *See Ward*, 964 S.W.2d at 622-23. In *Ward*, the defendant was indicted for possession of marijuana. *Ward*, 964 S.W.2d at 618. After indictment, the Comptroller sent him a notice that he owed $ 120,501.15 in taxes and penalties on the marijuana. The Comptroller eventually issued a state tax lien for the amount owed. The defendant made a $ 250 payment. *Id.* After making the payment, the defendant filed a pretrial writ of habeas corpus, arguing that his payment constituted punishment for double jeopardy purposes. *Ward*, 964 S.W.2d at 619.

The court of criminal appeals noted there were seven *possible* points at which a person may be considered punished under the tax act: (1) automatic statutory imposition of the tax;[5] (2) receipt of a tax determination notice after the Comptroller has assessed the tax; (3) when a tax lien is imposed or when State action is taken to enforce the lien; (4) when third parties are notified of a tax determination or when State action is taken to levy against frozen assets or debt held by third parties; (5) forfeiture of assets; (6) the State obtaining a final judgment of tax liability; or (7) payment of the tax. *Ward*, 964 S.W.2d at 623-24. Only four of these possibilities

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[5] Under the Controlled Substances Tax Act, the tax becomes due immediately upon a person's possession of a taxable substance. TEX. TAX CODE ANN. § *159.101(c)* (Vernon 1992).

existed in *Ward*: (1) automatic statutory imposition of the tax; (2) assessment of the tax as evidenced by the Comptroller's tax determination notice; (3) the Comptroller's imposition of a tax lien; or (4) payment on the tax due. Therefore, the court considered only whether the defendant's prosecution for possession was barred at any of these four points. *See Ward,* 964 S.W.2d at 624.

The court held that because a defendant suffers no punishment by the automatic statutory imposition of the tax, imposition of the tax cannot constitute punishment. *Ward,* 964 S.W.2d at 628. Likewise, the court held that the tax assessment was not punishment because it was not a final determination of the defendant's tax liability, nor a final judgment. *Ward,* 964 S.W.2d at 630-31. The court further determined that imposition of a tax lien also did not constitute punishment. *Ward,* 964 S.W.2d at 631-32. The court reached this conclusion for several reasons, including the fact that a tax lien restricts a person's property rights but does not extinguish ownership and because a tax lien can be withdrawn by the State or Comptroller. *Id.*

Finally, the *Ward* court considered whether the defendant's partial payment of the tax constituted punishment for double jeopardy purposes. The court held that "absent full payment of the tax or a pay arrangement with the Comptroller's office for the remaining amount due, there is no 'punishment' for purposes of the Double Jeopardy Clauses' prohibition against multiple punishments." *Ward,* 964 S.W.2d at 632; *see Ex parte Chappell,* 959 S.W.2d 627, 629 n.4 (Tex. Crim. App. 1998) ("We recently held that partial payment of a drug tax assessed against an individual is not punishment implicating the Double Jeopardy Clause (absent

evidence of a payment arrangement with the Comptroller) . . ."). The court noted that nothing in the record indicated the defendant made arrangements with the Comptroller to pay the remaining amount and nothing indicated he would ever pay the remaining tax due. *Ward,* 964 S.W.2d at 632. The court also noted that a person had a right under the tax code to bring suit to challenge the validity of the tax even after making a protest payment. *Ward,* 964 S.W.2d at 632-33. Thus, if partial payment constituted punishment, it would be possible for a defendant to make a partial payment and jeopardy-bar his criminal prosecution and yet later successfully challenge the tax. *Ward,* 964 S.W.2d at 633. The *Ward* court concluded that the defendant "neither received a final judgment of tax liability nor was divested of ownership rights in his property" and thus he was not punished. *Id.* The court expressly overruled *Stennett* to the extent that it may be interpreted as holding the assessment of the tax and/or partial payment of the tax due constitute punishment for purposes of the prohibition against successive punishments.

DISCUSSION

We now examine the facts of this case in light of *Ward*. Under *Ward*, appellants have not been punished for double jeopardy purposes by the automatic statutory imposition of the tax, assessment of the tax as evidenced by the Comptroller's tax determination notice, or the partial payment on the tax due. Appellants assert that jeopardy attached when the Comptroller levied on the money in their bank account. The State, however, contends appellants' criminal prosecutions are not barred until: (1) there is a permanent deprivation of ownership; (2) there is a full

payment or pay arrangement on the tax due; and (3) the government obtains a final judgment of tax liability.

The *Ward* court did not consider whether a defendant is punished for double jeopardy purposes when the Comptroller levies on a defendant's assets because that situation was not present in *Ward*. Despite the fact that State action was taken to collect a portion of the tax from appellants, appellants have still only paid a small portion of the tax assessed against them - about ten percent. We read *Ward* to require either full payment of the tax, a pay arrangement with the Comptroller for the remaining amount due, or a final judgment of tax liability before a defendant has been punished for double jeopardy purposes. *See Ward,* 964 S.W.2d at 632-33. We therefore conclude that prosecution of appellants for possession with intent to deliver cocaine is not barred by the Double Jeopardy Clause.

The trial court reached this same conclusion, but for a different reason. In accordance with *Stennett*, the trial court in this case concluded that the tax assessed against appellants was punitive. However, instead of granting appellants the relief they requested, the trial court concluded that appellants could still be prosecuted. The court's judgment stated that the Texas Controlled Substances Tax Act was void because it "violated[d] the grant of prosecutorial authority," or in other words, because the Texas Constitution vests sole prosecution of criminal offenses in the Criminal District Attorney's Office. The court's judgment further stated that "the Comptroller shall forthwith cancel the tax assessed, return defendant's money, together with interest therein."

Although the issue of the constitutionality of the Controlled Substances Tax Act was not expressly before the court of criminal appeals in *Stennett* or *Ward,* the court of criminal appeals implicitly held that the tax was constitutional. In light of *Stennett* and *Ward*, we conclude that the trial court erred in determining that the tax was unconstitutional.[6] Accordingly, we modify the trial court's orders denying appellants the relief requested in their applications for writ of habeas corpus. Specifically, we delete the language in the orders declaring the act void and ordering the Comptroller to cancel the tax assessed and return appellants' money. As modified, we affirm.

/s/_____
LINDA THOMAS
CHIEF JUSTICE

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[6] We note that the trial court in this case appears to have raised the issue of the constitutionality of the tax *sua sponte*. The State did not argue in the trial court that the tax was unconstitutional, and the State does not address the issue in the appellate brief.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

[Entered May 30, 2001]

NOS. 584-00 & 585-00

EX PARTE CIPRIANO CORRAL
& EX PARTE CATALINA CORRAL,
Appellants

Appeal from the Fifth Court of Appeals
Dallas County
No. 05-97-00891-CR and No. 05-97-00895-CR
Chief Justice Thomas, Justice Wright, and Justice Moseley

ON APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS DALLAS COUNTY

Delivered per curiam.

OPINION

Appellants Catalina Corral and Cipriano Corral were charged with aggravated possession of a controlled substance with intent to deliver: cocaine. The Texas Comptroller

assessed a tax on the cocaine under the Texas Controlled Substance Tax Act, then seized the contents of appellants' bank accounts. The amount seized was less than one percent of the tax due. Appellants filed pre-trial applications for writs of habeas corpus alleging, based on that seizure, that their criminal prosecutions were barred under the Double Jeopardy Clauses of the United States and Texas Constitutions. The trial court denied relief. The court of appeals reversed the trial court's orders and remanded with instructions that the indictments be dismissed. *Ex parte Corral,* Nos. 05-97-00891-CR & 05-97-00895-CR (Tex. App.--Dallas November 18, 1997) (not designated for publication), 1997 Tex. App. LEXIS 5944. The state filed petitions for discretionary review. We granted the state's petitions, vacated the judgments of the court of appeals and remanded for reconsideration in light of *Ex parte Ward,* 964 S.W.2d 617 (Tex. Crim. App. 1998). *Ex parte Corral,* Nos. 66-98 & 67-98 (Tex. Crim. App. April 22, 1998) (not designated for publication). On remand, the court of appeals modified the trial court' s orders and affirmed those orders as modified. *Ex parte Corral,* Nos. 05-97-00891-CR & 05-97-00895-CR (Tex. App.--Dallas November 2, 1999) (not designated for publication), 1999 Tex. App. LEXIS 8164. Appellants filed petitions for discretionary review. We granted appellants' petitions to determine whether the court of appeals had erred.

After reviewing the briefs of the parties and the relevant portions of the record, we conclude that our decision to grant appellants' petitions was improvident. Accordingly, we dismiss the petitions. *See* Tax. R. AP},. P. 69.3.

Per Curiam

Date Delivered: May 30, 2001
En Banc
Do Not Publish

APPENDIX C

COURT OF APPEALS OF TEXAS
FIFTH DISTRICT, DALLAS

[Filed November 18, 1997]

No. 05-97-00891-CR, No. 05-97-00895-CR

EX PARTE CIPRIANO CORRAL,
EX PARTE CATALINA CORRAL

Appeal from the Criminal District Court No. 2
Dallas County, Texas
Nos. W94-00772-I & W94-00768-I.

Chief Justice Thomas and Justices Wright and Moseley.

OPINION

Opinion By Chief Justice Thomas

Cipriano Corral and Catalina Corral appeal from the trial court's denial of the relief requested in their applications for writ of habeas corpus. In their applications for writ of habeas corpus, they raised double jeopardy as a plea in bar to prosecution for possession of cocaine with intent to deliver. At issue in this appeal is whether appellants may be prosecuted for possession with intent to deliver cocaine after they were taxed on the cocaine and paid a portion of that tax.

We conclude that criminal prosecution is barred. We therefore reverse the trial court's orders denying appellants' applications for writ of habeas corpus and remand [*2] these causes to the trial court with instructions to dismiss the indictments.

Background

The Fifth Amendment to the United States Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause provides three separate protections for criminal defendants: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. *Ex parte Stover,* 946 S.W.2d 343, 345 (Tex. Crim. App. 1997). The third protection, the one implicated by the facts of this case, is limited, in the context of a single proceeding, to ensuring that the total punishment imposed does not exceed that authorized by the legislature. *Id.*

Appellants are husband and wife. On September 18, 1993, the police executed a search warrant at appellants' apartment. The police seized from them 1163.3 grams of cocaine. Appellants were subsequently indicted for possession with intent to deliver cocaine. On November 16, 1993, the Comptroller of Public Accounts for the State of Texas notified appellants that, pursuant to the Controlled Substances Tax Act, they each owed taxes and penalties of $ 245,740 on the

cocaine seized.[1] See TEX. TAX CODE ANN. § 159.001-.301 (Vernon 1992 & Supp. 1997) (Controlled Substances Tax Act). Later, the Comptroller instructed appellants' bank to freeze appellants' account.[2] The Comptroller eventually sent the bank a notice of levy, directing the bank to send it all of appellants' assets in the bank's possession, not to exceed $ 245,740. The bank sent the Comptroller a check for $ 2,434.79, all the money appellants had on deposit.

Appellants filed applications for writ of habeas corpus. They argued that the criminal prosecutions pending against them violated the Double Jeopardy Clause because they had already been punished for the drug offenses through the assessment and collection of the tax. In *Stennett v. State*, 941 S.W.2d 914, 917 (Tex. Crim. App. 1996), the court of criminal appeals held that the Texas tax on controlled substances is a punishment for Double Jeopardy purposes. In accordance with *Stennett*, the trial court in this case concluded that the tax assessed against appellants was punitive. However, instead of granting appellants the relief they requested, the trial court concluded that appellants could still be prosecuted. In its written conclusions of law, the court concluded that the Controlled Substances Tax Act was void

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[1] The Act imposes a tax "on the possession, purchase, acquisition, importation, manufacture, or production by a dealer of a taxable substance on which a tax has not previously been paid." TEX. TAX CODE ANN. § 159.101(a) (Vernon 1992). Cocaine is a taxable substance and is taxed at a rate of $ 200 per gram. TEX. TAX CODE ANN. §§ 159.001(7), 159.101(b) (Vernon Supp. 1997)

[2] The bank account referred to was in Catalina Corral's name only; however, the trial court found that the account was community property.

because it "violated the grant of prosecutorial authority," or in other words, because the Texas Constitution vests sole prosecution of criminal offenses in the Criminal District Attorney's Office. The trial court did not refer to any specific provisions of the Texas Constitution. The court ordered the Comptroller to cancel the tax assessed and return appellants' money.

Discussion

Appellants contend the trial court erroneously concluded that the tax was void. Rather than argue that the Controlled Substances Tax Act is unconstitutional, the State contends that assessment and partial payment of the tax did not place appellants in jeopardy. We agree with appellants.

In *Stennett*, the Comptroller billed the defendant for taxes of $ 49,070 on marijuana. *Stennett,* 941 S.W.2d at 915. The defendant sent the Comptroller a check for $ 100. He then filed an application for writ of habeas corpus, alleging that payment of the tax barred his criminal prosecution for possession of marijuana. *Id.* The court concluded that the defendant could not be prosecuted for possession of marijuana because he had already been punished for that offense by the imposition and partial collection of a tax on the marijuana. *See id.* at 917. The court relied on the United States Supreme Court's opinion in *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 114 S. Ct. 1937, 218 L. Ed. 2d 767 (1994), in which the Court held that a Montana tax on possession of the marijuana, similar to the Texas tax, was a punishment for purposes of the constitutional prohibition against successive punishments for the same criminal offense. *Stennett,* 941 S.W.2d at 915-17.

The issue of the constitutionality of the Controlled Substances Tax Act was not expressly before the court of criminal appeals in *Stennett*. By holding that the defendant could not be prosecuted for possession of marijuana because he had already been punished by the tax, however, the court of criminal appeals implicitly held that the tax was constitutional. In light of *Stennett*, we decline to conclude that the Controlled Substances Tax Act is unconstitutional.[3]

The State argues that the trial court's orders should be upheld because the assessment and partial payment of the tax did not place appellants in jeopardy. The State argues that before jeopardy attaches, the defendant must be "put to trial before the trier of facts" in a judicial proceeding or when the government's claim has been reduced to final judgment. Three of our sister courts of appeals have disagreed, holding that the *assessment* of the controlled substances tax is the event that bars subsequent prosecution. *DeLeon v. State*, 951 S.W.2d 283, 286 (Tex. App.--Houston [14th Dist.] 1997, pet. filed); *State v. Rocha*, 944 S.W.2d 701, 705-06 (Tex. App.--Corpus Christi 1997, pet. filed); *Ward v. State*, 915 S.W.2d 941, 946 (Tex. App.--Houston [1st Dist.] 1996, pet. granted). ***But see*** *Broussard v. State*, 1997 Tex. App. LEXIS 4705 at 5-6, No. 12-96-00119- CR, 1997 WL 530749 (Tex. App.--Tyler Aug. 27, 1997, no pet.) (jeopardy does not attach in controlled substances tax case until government's claim has been reduced to final judgment or until defendant pays all or part of

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[3] We note that the trial court in this case appears to have raised the issue of the constitutionality of the tax *sua sponte*. The State did not argue in the trial court that the tax was unconstitutional, and the State does not even address the issue in its appellate brief.

assessed tax).

We do not and need not express an opinion about whether assessment alone bars subsequent prosecution. In *Stennett*, the court of criminal appeals did not specifically state at what point jeopardy attaches in a proceeding to collect controlled substances taxes. However, the court concluded that the defendant, who had been billed for the tax and who had paid $ 100 of the tax, could not be prosecuted. *Id.* at 917. For us to conclude that jeopardy did not attach to appellants, who were billed for the taxes and who paid $ 2,434.79 (albeit involuntarily), would be contrary to *Stennett*. We therefore decline to do so. We note that the State does not even mention *Stennett* in its brief.

The State also argues that we must apply the *Blockburger* test to the facts of this case, and that application of that test leads to the conclusion that appellants can be prosecuted. *See Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932). We disagree. Under *Blockburger*, where the same act or transaction constitutes a violation of two distinct statutory provisions, to determine whether there are two offenses or only one, the test is whether each provision requires proof of an additional fact which the other does not. *Ex parte Anthony*, 931 S.W.2d 664, 666 (Tex. App.--Dallas 1996, pet. ref'd). In the multiple punishment context, however, *Blockburger* is a rule of statutory construction to be used in determining whether the legislature intended multiple punishment. *State v. Perez*, 947 S.W.2d 268, 270 n.3, 272 (Tex. Crim. App. 1997). It is not controlling in the face of clear legislative intent. *Id.* at 270 n.3. The legislative history of the Controlled Substances Tax Act makes it clear that the legislature intended the tax only as

a means of punishing people for the commission of a crime. *See Stennett*, 941 S.W.2d at 917 (quoting excerpts from legislative history).

We conclude that prosecution of appellants for possession with intent to deliver cocaine is barred by the Double Jeopardy Clause because appellants have already been punished for that offense by the imposition and partial collection of a tax on the cocaine. Accordingly, we reverse the trial court's orders denying appellants the relief they requested in their application for writ of habeas corpus and remand these causes to the trial court with instructions to dismiss the indictments.

/s/_____
LINDA THOMAS
CHIEF JUSTICE

APPENDIX D

TEXAS COURT OF CRIMINAL APPEALS

[Filed April 22, 1998]

Nos. 66-98 and 67-98

EX PARTE CIPRIANO CORRAL)
EX PARTE CATALINA CORRAL)

OPINION ON STATE'S PETITIONS FOR DISCRETIONARY REVIEW

Appellants were assessed a controlled substances tax in the amount of $245,740. In response to the Comptroller's notice of levy, Appellant's bank sent a check for $2,434.79 to the Comptroller. Appellants faced criminal charges for possessing cocaine with intent to deliver. The criminal charges were based on the same cocaine that was the subject of the tax. Appellants sought habeas corpus relief, claiming they were already punished for double jeopardy purposes by the tax. The court denied relief. On appeal, the Court of Appeals held that the Double Jeopardy Clause barred the criminal prosecution because Appellants had already been punished under Stennett v. State, 941 S.W.2d 914 (Tex. Cr. App. 1996). Corrall v. State, Nos. 05-97-0891-CR & 05-97-0895-CR (Tex. App. - Dallas, delivered November 18, 1997).

Ground number one of the State's petition for discretionary review asserts the Court of Appeals erred in holding that Appellants were subjected to a prior punishment merely by paying a portion of the controlled substances tax. The Court of Appeals did not have the benefit of our recent decision in Ex parte Ward, __ S.W.2d __ (Tex. Cr. App. Nos. 420-96 & 421-96, delivered January 21, 1998), in which we examined the point at which a person is punished by the controlled substances tax.

We grant ground number one of the State's petition for discretionary review, vacate the Court of Appeals' judgment, and remand this cause to that court for reconsideration in light of Ward. The State's other ground for review is refused.

PER CURIAM

DELIVERED: April 22, 1998
EN BANC
DO NOT PUBLISH

APPENDIX E

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

[Filed January 3, 2000]

Nos. 05-97-00895-CR and 05-97-00891-CR

EX PARTE CIPRIANO CORRAL	)
EX PARTE CATALINA CORRAL, *Appellant*	)

Before Chief Justice Thomas
and Justices Wright and Moseley

ORDER

We **DENY** appellant's motion for rehearing.

/s/_____
LINDA THOMAS
CHIEF JUSTICE